

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAUL D. BORQUEZ and DEPARTMENT OF THE AIR FORCE,
DAVIS-MONTHAN AIR FORCE BASE, Tucson, AZ

*Docket No. 02-2246; Submitted on the Record;
Issued February 14, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant forfeited \$104,802.11 in compensation benefits for failure to report earnings; and (2) whether appellant was at fault in the creation of the overpayment.

On October 22, 1985 appellant, then a 30-year-old power support systems mechanic, developed back pain while lifting a battery. He stopped working on October 23, 1985 and returned to work on November 4, 1985. On October 6, 1988 appellant was repositioning air bottles when the bar he was using slipped and he fell into the bottles. He filed a claim for strained back muscles. Appellant stopped working on October 11, 1988 and returned to work on October 17, 1988. On January 31, 1989 appellant developed back pain after repeated lifting and starting of Stihl saws for an extended period. On June 27, 1989 he had pain in his lower back while lifting the tongue of an air compressor. On January 9, 1990 appellant, then working as a supply clerk, developed back pain while pulling a box of computer paper from below a cabinet. The Office accepted appellant's claim for lumbar strain and began payment of temporary total disability compensation effective May 3, 1990. Appellant's position was subsequently terminated because of physical disability.

In an April 27, 1995 decision, the Office terminated appellant's compensation on the grounds that the residuals of his employment injuries had ceased. Appellant requested a hearing before an Office hearing representative. In an April 24, 1996 decision, the Office hearing representative found that the decision of the Office was based on a medical report that assumed appellant's L5-S1 herniated disc was not causally related to appellant's employment injuries. The hearing representative found an uncontroverted inference that appellant's L5-S1 herniated disc was causally related to the employment injuries. He set aside the Office's April 27, 1995 decision and remanded the case for further development.

On May 9, 1996 appellant filed a claim for retroactive compensation from May 14, 1995. He did not report any income for the period. The Office accepted appellant's claim for a herniated L5-S1 disc and reinstated appellant's compensation effective July 1, 1996. In a

December 3, 1999 decision, the Office found appellant could perform the duties of a telephone solicitor and therefore had a 65 percent loss of wage-earning capacity. Appellant requested a review of the written record by an Office hearing representative. In a December 4, 2000 decision, finalized January 12, 2001, the Office hearing representative affirmed the Office's December 3, 1999 decision.

In a September 23, 1998 letter, the Office asked appellant to complete a CA-1032 form to report any earnings from employment in the prior 48 months. In a September 30, 1998 response, appellant indicated that he was neither employed nor self-employed for the prior 48 months. In a January 25, 1999 CA-1032 form, he indicated that he had no earnings from employment for the prior 15 months. In a September 9, 1999 CA-1032 form, appellant indicated that he had no earnings from employment for the prior 15 months. He noted that he had a business license but his business was inactive.

In a June 20, 2000 decision, the Office terminated appellant's compensation because he had pled guilty on June 15, 2000 to one count of mail fraud to obtain workers' compensation benefits. The Office noted that appellant had reported no earnings in a September 30, 1998 CA-1032 form but he actually had earnings during the period covered by the form.

In a June 18, 2001 report, a special agent for the Department of Labor's Office of the Inspector General indicated that appellant reported to a probation officer that he was employed as a photographer at a photography shop from September 1994 through July 1995, earning \$4.50 to \$5.50 an hour. He reported that appellant was self-employed as a photographer from August 1995 to April 1999. The agent reported that, in an April 19, 1999 interview, appellant initially denied that he had been employed during the period in question. When confronted with the evidence of prior employment, however, appellant indicated that he had forgotten his employment at the photography shop when he was completing the May 9, 1996 CA-8 form and the September 30, 1998 CA-1032 form. He added that his self-employment as a photographer was inactive. The agent reported that appellant was indicted on February 16, 2000 with two counts of violating 18 U.S.C. § 1920 relating to false statements or fraud to obtain compensation under the Federal Employees' Compensation Act and two counts of mail fraud under 18 U.S.C. § 1341. On June 15, 2000 appellant entered a guilty plea to one count of mail fraud in violation of section 1341 relating to the September 30, 1998 CA-1032 form. On December 22, 2000 he was sentenced to five years of probation. On April 20, 2001 appellant was ordered to pay restitution of \$5,600.00. The judge noted that the government was not precluded from seeking further restitution through civil or administrative action.

In a June 26, 2001 letter, the Office made a preliminary determination that appellant had received an overpayment of \$104,367.25 because he forfeited compensation benefits for the period March 1, 1995 to January 2, 1999 for knowingly omitting or understating his earnings. The Office found appellant was at fault in the matter of the overpayment because he pled guilty in open court to one count of committing mail fraud to obtain benefits under the Act. The Office found that appellant made an incorrect statement that he knew or should have known was incorrect. The Office indicated appellant had the right to submit evidence or arguments if he disagreed that an overpayment occurred, disagreed with the amount of the overpayment or believed that the overpayment occurred through no fault of his own and that recovery of the

overpayment should be waived. The Office also informed appellant of his right to a prerecoupment hearing before an Office hearing representative.

In a July 23, 2001 letter, appellant requested a prerecoupment hearing which was held on December 4, 2001. In a June 10, 2002 decision, an Office hearing representative found that appellant was at fault in the creation of the overpayment because he failed to provide information which he knew would be material. He ordered appellant to repay \$100.00 a month.

The Board finds that appellant forfeited compensation for the period March 1, 1995 through September 30, 1998.

Section 8106(b) of the Act provides in pertinent part:

“An employee who --

(1) fails to make an affidavit or report when required; or

(2) knowingly omits or understates any part of his earnings;

forfeits his right to compensation with respect to any period for which the affidavit or report was required. Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee or otherwise recovered under section 8129 of this title, unless recovery is waived under that section.”¹

Appellant, in the May 9, 1996 CA-8 form, indicated that he had not worked since May 14, 1995. In a September 30, 1998 CA-1032 form, which covered a period of 48 months, appellant again indicated that he had not worked for the period covered by the CA-1032 report. However, the Office of the Inspector General produced evidence that showed appellant worked at a photography shop from September 1994 to July 1995. He therefore failed to report earnings during the period covered by each of the reports. Moreover, appellant pled guilty of one count of mail fraud in making a false statement in the September 30, 1998 CA-1032 form that he had no earnings during the period in question. As appellant pled guilty, he admitted that he had knowingly failed to report his earnings, showing intent under section 8106(b)(1). Accordingly, appellant forfeited his right to compensation for the period up to September 30, 1998.

Appellant’s subsequent CA-1032 forms, dated January 25, 1999 and September 9, 1999, covered the preceding 15 months. In each case, appellant indicated that he did not have earnings during the period in question. The Office, however, has only indicated that appellant held himself out as self-employed during the periods covered by these reports. Appellant stated that he had not used his business license during the period. The Office has not produced evidence that appellant had earnings from self-employment during the period covered by these reports. Therefore, the Board finds the period of forfeiture to be the period covered by the September 30, 1998 CA-1032 form and the May 9, 1996 CA-8 form.

¹ 5 U.S.C. § 8106(b).

The Board notes that appellant was ordered to make restitution of \$5,600.00. The court did not restrict the Office's right to seek administrative recovery of the amount of the overpayment. Therefore, the Office can seek to recover the entire amount forfeited. However, the Office should give appellant a credit for the amount of restitution ordered by the court.² The record does not show that the Office gave appellant credit for the court-ordered restitution.

The Board further finds that appellant was at fault in the creation of the overpayment of compensation and therefore is not entitled to waiver of recovery of the overpayment.

Section 8129(b) of the Act provides, "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment of recovery would defeat the purpose of [the Act] or would be against equity and good conscience."³ Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

Section 10.433(a) of the Office's implementing regulations⁴ provides as follows:

"[The Office] may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payment he or she receives from [the Office] are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual.)"⁵

The Office found that appellant was at fault in the creation of the overpayment because he had made an incorrect statement as to a material fact. Appellant failed to report earnings when required to do so by the Office. By his admission of guilt in a court proceeding, appellant

² Federal (FECA) Procedure Manual, Part 6 -- Overpayment and Collections, *Debt Liquidation*, Chapter 6.300.19(b) (September 1994). The court's order pertaining to restitution did not represent a "global settlement."

³ 5 U.S.C. § 8129(b).

⁴ 20 C.F.R. § 10.433(a).

⁵ 20 C.F.R. § 10.433(a).

has acknowledged he knowingly made an incorrect statement concerning a material fact. The Office requests earnings information so as to determine whether a claimant continues to be entitled to temporary total disability compensation or has shown an ability to earn wages which would result in a determination of his wage-earning capacity and a reduction in compensation. Appellant, by failing to report his earnings, concealed a material fact. The Office therefore properly found that he was at fault in the creation of the overpayment.

The Board notes, however, that the Office decision terminating compensation would affect the amount of the overpayment. The Board has the jurisdiction to determine if an overpayment occurred.⁶ In this case, the Office terminated appellant's compensation effective June 15, 2000 based on the date he entered his plea of guilty. However, under the applicable federal regulations, compensation is to be terminated as of the date the guilty plea is accepted or the date a verdict of guilt is returned after trial.⁷ In this case, appellant's guilty plea was not accepted by the judge until December 22, 2000. The Office, therefore, acted prematurely in terminating appellant's compensation. Appellant is entitled to compensation for the period June 15 to December 22, 2000, which can be credited against the amount of the overpayment.⁸

The decision of the Office of Workers' Compensation Programs dated June 10, 2002 is hereby affirmed insofar as it finds that the Office properly found that appellant forfeited compensation and was at fault in creation of the overpayment. The decision is modified to reflect that the period of forfeiture of compensation is March 1, 1995 to September 30, 1998. The decision is set aside as to the amount of the overpayment and the case is remanded for recalculation of the amount of the overpayment.

Dated, Washington, DC
February 14, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

⁶ *Samuel Russo*, 28 ECAB 43 (1976).

⁷ 20 C.F.R. § 10.17.

⁸ *See* 20 C.F.R. § 10.441 (specifies the manner in which the Office may collect overpayments).